Filed 6/1/09 In re M.P. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re M.P., a Person Coming Under the Juvenile Court Law.	B207299 (Los Angeles County Super. Ct. No. CK 68074)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.P., Defendant and Appellant.	

APPEALS from orders of the Superior Court of Los Angeles County. Elizabeth Kim, Juvenile Court Referee. Reversed and remanded.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

D.P. is the father of minor M.P. M. was removed from appellant's custody and placed in foster care. Appellant appeals from the order granting M.'s Welfare and Institutions Code section[1] 388 petition placing the child with her mother. Appellant also appeals from the subsequent order at a six-month review hearing. Appellant contends that by placing M. with mother prior to the hearing on the section 388 petition, among other things, the court violated his due process rights and that the court erred by denying his request for a contest on placement at the six-month hearing. We reverse and remand.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Detention

This case came to the attention of Los Angeles County Department of Children and Family Services (Department) on May 4, 2007, due to a referral alleging that R., M.'s half-sibling, was a victim of medical neglect by appellant. Appellant had taken R. to Children's Hospital due to a recurrence of chickenpox, which was severely infected and untreated. The hospital staff determined appellant was medicating R. inappropriately and claimed appellant exhibited bizarre behaviors they attributed to mental health problems. When appellant and M. stayed in the hospital overnight with R., M. appeared out of control.

Appellant stated the medications he administered to R. were provided by his son's doctors, and he had taken R. to the hospital because his son had a rash which was progressively getting worse and the medications were not helping. Appellant explained that what might have been perceived as unusual behavior was his agitation due to his concern for his son's welfare.

When the social worker (CSW) contacted M.'s mother, mother stated she wanted custody of M. Mother was living with two roommates, one of whom had a criminal

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[1] All statutory references are to the Welfare and Institutions Code.

record and was in violation of parole. Mother was willing to ask that person to leave if M. were put in her care. Mother stated she suffered from a mood disorder and her mother suffered from depression.

In an incident two years earlier, appellant had taken M. to the hospital with what appeared to be symptoms of a drug overdose, but no conclusive diagnosis was ever made. The CSW removed M. from appellant's care and surmised M. could not be returned to either parent's care without further investigation of mother's mental and emotional problems and her failure to take her prescribed psychotropic medication regularly and appellant's mental and emotional problems.

Both parents attended the detention hearing. The court denied appellant's request for M.'s return with the support of informal services. Minor's counsel opined M. should not be released to either parent and asked the siblings be placed together in foster care if possible. The court ordered that M. be medically evaluated and that both parents' visits be monitored.

II. Jurisdiction

Appellant was a prior dependent of the system who had encountered poor treatment while in foster care and had been abused. Appellant had run away in his early teens and had supported himself until he had a bad fall from a third story roof and permanently injured his back. Appellant had been unable to work for the past ten years and required prescription medication to control his constant pain.

Mother lived in Lake Arrowhead and worked as a caregiver. Mother's older daughter B. had been diagnosed with attention deficit disorder (ADHD) and bi-polarism and was mildly retarded. Mother was currently in a relationship with a man who lived in her home. Due to an incident several years prior when B. had injured M., the children were separated on the advice of a doctor. Appellant, R. and M. had visited mother in Arrowhead until two years ago when appellant and mother broke up. Mother only saw M. infrequently because appellant would not allow regular contact.

Both parents accepted they had shortcomings but were willing to work on their problems to gain custody of M. R. expressed concern about his sister's welfare if left unsupervised with B. M. stated she wanted to live with either parent.

The Department believed appellant needed to address his parenting skills and emotional problems and secure his home so that his children did not have unauthorized access to medications. The CSW had cleared mother's home and live-in companion. The CSW had also called B.'s school and been told mother met her daughter's needs. The CSW recommended M. be placed with mother.

Although M. and R. were initially placed separately, they were reunited in one foster home on May 14 and were observed to be very bonded to one another. The CSW believed that relationship should be maintained and, if M. was placed with mother, recommended weekly sibling visits.

At the May 30 hearing, mother asked for visitation with M. in her home, including overnights. Appellant expressed concern due to B.'s aggressive behavior and lack of impulse control. Mother admitted B. had impulse control problems and occasionally pushed and struck others. B. was receiving weekly therapy and saw a psychiatrist once a month.

Over appellant's objection, the court ordered mother could have a day visit with M. without B. and a subsequent overnight visit in mother's home, but M. was not to be left unsupervised. The court gave the Department discretion to allow monitored contact between M. and B. Appellant was allowed unmonitored telephone contact with M.

By June, appellant was visiting with M. regularly, monitored, three times a week. Mother had her first unmonitored visit with M. on June 8. The next day, the CSW monitored one hour of M.'s visit with mother, B. and mother's boyfriend and then allowed M. to go home with them. B. behaved well with her sister, and M. cried when separated from mother.

M. was referred for a psychological evaluation as she had experienced ongoing enuresis and encopresis. Although M.'s school had requested a follow-up, appellant had not taken M. to Pacific Clinics, stating he did want M. medicated. Appellant felt the problem was age appropriate. The school reported staff had given M. changes of clothing from the school closet, but the clothes were never returned and M. came to school dirty, with her shoes on the wrong feet. Since M. had been in foster care, the incidents of urinating and defecating on herself had significantly decreased. M.'s school counselor expressed concern because M. seemed to be talking to an imaginary person and was fearful someone was following her. M.'s pediatrician felt appellant was providing good care for his children. On the other hand, the school counselor felt M. had special needs which appellant could not meet.

Appellant had enrolled in a parenting class and drug tested. The CSW believed that because the one visit in mother's home had gone well, M. should be permanently released to mother.

In June, a first amended petition was filed, the court gave mother an extended five-day visit and ordered a 730 evaluation to address M.'s mental health and medical needs.

Mother reported the extended visit had gone well, she had taken M. to various amusement parks, and M. and B. had no problems getting along except in sharing.

The court received the family law order of August 15, 2002, which gave appellant sole legal and physical custody of M. Mother was awarded supervised visitation with M., twice a week while B. was in school. If B. was present, mother's visits were to be monitored by two adults due to B.'s behavioral problems. The Department report attached a positive character reference from one of appellant's neighbors stating appellant was a good father. Appellant's treating physician affirmed appellant had been under his care for many years due to intractable back pain and he was currently reevaluating appellant's medications.

The court took jurisdiction over M. under section 300, subdivisions (b) and (j). The latter was based on the derivative risk due to appellant's limited ability to care for R. and R.'s special needs. The subdivision (b) count alleged:

> The child [M.] has special/unique problems including encopresis, enuresis, talking to herself and fear of being followed. Father [] has demonstrated a limited ability to deal with these problems, including refusing and/or failing to follow through on referrals for counseling to address [M.'s] special/unique problems. Such failure and/or refusal to address the minor's issues subjected the minor to continue to exhibit these embarrassing emotionally damaging incidents without relief and place the child at risk of physical and emotional harm and damage.

The court ordered a new 730 evaluation for M. because the prior evaluator could not provide one in a timely manner. Mother asked M. be placed with her pursuant to section 361.2 because she was a non-offending parent. Appellant opposed release because nothing was known of B.'s current condition and diagnosis or the risk she posed to M. M.'s counsel did not oppose release to mother provided B.'s treating psychiatrist could verify B. presented no danger to M. Because the Department had made no independent investigation of the family law file, county counsel would only agree to weekend visits with mother on the condition M. would not be left alone with B.

Although the court allowed the weekend visits to continue, it did not release M. to mother. The court refused to give the Department discretion to further liberalize visits because the Department had recommended the release before properly investigating B.'s psychiatric condition and the basis for the family law orders.

The court appointed Dr. Nancy Kaiser-Boyd (Dr. Boyd) to perform the 730 evaluation of M., R., appellant and mother. Dr. Boyd was not asked to and did not evaluate M.'s relationship with her brother R. Dr. Boyd submitted her report on September 26, 2007. Dr. Boyd believed that for the two sisters to live together successfully, M. needed to be old enough and firm enough to set limits with her older

sister as no parent could supervise every moment of their interactions. While in the doctor's waiting room, an unrelated child observed B. repeatedly hitting M. and reported the incident to the doctor.

M. was affectionate towards both parents, but particularly so with appellant; she ran and hugged him upon first seeing him. M. said B. was mean to her and always broke things and she really missed her dad and their house.

Dr. Boyd stated that although there was no indication appellant was abusing his pain medication, the medications he had been prescribed had inherent side effects which impacted cognitive functioning and one's energy level. Dr. Boyd opined appellant was not unduly laden with anxiety or depression, was not a sociopath and did not have any psychotic or personality disorder, and it was unlikely he would harm his children. The doctor acknowledged M.'s needs were apparently not being met in appellant's home. Dr. Boyd validated appellant's concern for M. if she were to reside in mother's home because of B.'s potential aggression and the risk from unrelated males. Dr. Boyd noted it was possible appellant exaggerated the risk from B. so M. would be placed with him and a great deal of his angst over the removal of his children was due to the impact on his finances.

Mother acknowledged that when B. got angry or out of control, she feared her daughter might harm herself or someone else. B. took various psychotropic drugs. Mother stated B. "wakes up angry no matter how much sleep she has gotten. Sometimes she gets over twelve hours." Mother admitted she knew very little about her current live-in boyfriend other than he was still married and had been in Desert Storm. The doctor was concerned that while she was exploring with mother the dangers of sexual abuse from unknown men in the home, mother remained expressionless and did not reveal B. had been sexually abused by her half-brothers when she was younger.

Dr. Boyd concluded that although normally, due to M.'s developmental delays and age, she would recommend M. be placed with mother, there were potential risks in that

home. Girls with developmental delays were at special risk of being targeted for physical and sexual abuse from unrelated males. Dr. Boyd recommended increased contact between M. and mother under the watchful eye of a parenting coach or a behavioral specialist who could help evaluate B.'s behavior, assist mother to effectively set limits with B. and help empower M. to defend and protect herself from B. Such supervised contact should take place until the next review in order to evaluate the long-term effect of the children's interaction. Dr. Boyd recommended regular and quality visitation between M. and appellant and that appellant's medications be reviewed and evaluated. If during the next period of supervision, M. and B. were getting along, Dr. Boyd recommended moving towards placing M. with mother.

III. Disposition

In October, the Department reported mother admitted B. still had trouble sharing with M. and would occasionally hit M., but mother did not think the behavior was outside the norm. The CSW reviewed Dr. Boyd's evaluation and believed the concerns about appellant outweighed the concerns about mother. The CSW acknowledged B.'s behavior should be evaluated, but continued to recommend M. be released to mother and the case be transferred to San Bernardino.

Later that month, the CSW reported services for B. had been in place for three months, but services for M. would not be available until her case was transferred to San Bernardino. Mother was receiving services through the San Bernardino program.

The disposition hearing was held over several days in October 2007.

A. CSW Testimony

CSW Debra Weisberg testified M. should be placed with mother and the case transferred to San Bernardino. Weisberg did not recommend placing M. with appellant because in the past he had not addressed the school's concerns about M.'s encopresis, because M. was behind in school and because of the three-year-old incident when M. had been hospitalized.

Weisberg had no concerns about M. residing with mother. During a visit to mother's home, Weisberg determined it was clean; she met the boyfriend, but not B. Weisberg acknowledged B. needed to be assessed as to whether she posed a risk to M.

Weisberg did not think breaking up the sibling group would be detrimental to M. because she would get to visit her brother. Weisberg, who wanted appellant to get counseling services, acknowledged that if the case was transferred to San Bernardino, the Department would not provide those services. Weisberg did not think mother's home presented any risk to M. based upon the two weekend visits which had taken place; she disagreed with Dr. Boyd there was a risk based on past incidents of violence because the girls were older.

B. Appellant

Appellant was aware of M.'s encopresis and had been in contact with school authorities and had been in the process of working on it. Appellant participated in M.'s scholastic evaluation and arranged for her teacher to tutor his daughter three times a week.

Mother told appellant that M. had suffered a perforated ear drum during a recent visit, but would not tell him how the injury had occurred.

Appellant's pain medication was monitored by his doctor, whom he saw every month or every other month. The doctor had taught appellant how to monitor his medication, and he had followed the doctor's advice for the past 10 years; his medication did not interfere with his parenting abilities.

Appellant was concerned that due to M.'s exposure in mother's home, M. was learning to become more physically and verbally aggressive and exhibited more aggression toward R. When M. and R. visited, they hugged and declared their love for one another.

The injury by B. to M.'s face several years ago was more than the scratch mother described. In 2003, he had seen B. strike M. on several occasions. B. would poke M.

and hit her very aggressively, typically in the face; he did not believe B. meant to hurt her sister, it was just that B. could not control her impulses.

C. Mother's Testimony

Mother became aware of M.'s ear injury when she picked up her daughter from the foster home. M. was complaining about the pain, so she took her daughter to emergency. The doctor determined the eardrum had been punctured, but believed it was an old injury. Mother still saw B. hit M. and say mean things to her sister, for which mother put B. in time out for punishment. Mother believed B.'s aggression had subsided a little in the last couple of months. M. sometimes cried when B. hit her.

B. had been attending counseling once a week for the last five years. Mother did not think B. would hurt her sister now because the first incident had happened years ago when B. was jealous of the young M. B. was getting better about throwing fits. Mother acknowledged B. could be unpredictable when jealous.

B.'s in-home services were provided for only three months at a time, and they were about to expire; the last round of services had not improved B.'s behavior. B. had been seeing a psychiatrist for over two years and was currently on various psychotropic medications designed to address impulse control, concentration for her ADHD, a stabilizer and an anti-depressant. Mother believed she and M. got along well and M. was starting to bond with her.

D. Court Ruling

The court declared M. a dependent under subdivisions (b) and (j) of section 300. The court stated that although it had returned R. to appellant's care the previous day, M. was not similarly situated, the chaos in appellant's home was detrimental to her, and, in the past, appellant had failed to follow up on M.'s educational needs. The court did not follow the recommendation to place M. with mother because the Department had failed to provide sufficient information to address the court's concerns about the risks imposed by unrelated males in mother's home and by B.

The court ordered appellant attend parenting, conjoint counseling with M., individual counseling to address pain management and independent living skills, pain medication evaluation and to follow the medical recommendations. The court ordered mother attend parenting, conjoint counseling with M., and individual counseling to address case issues and limit setting. The court ordered M. attend individual and conjoint counseling.

Appellant's visitation continued to be monitored with Department discretion to liberalize. Mother's visitation continued unmonitored, overnight-weekends, with Department discretion to liberalize. The court set the six month section 366.21, subdivision (e) review hearing for April 21, 2008.

IV. Interim Hearings

A. November 2007

The Department reported M. continued to reside in foster care. Appellant had enrolled in parenting classes; the issues of household structure, routine and independent living skills were going to be addressed through the family preservation services appellant was already receiving in R.'s case. Appellant had contacted individual counseling, but had not yet enrolled. M. had not started counseling, and mother had just enrolled in parenting classes. Both parents were complying with the case plan.

B. January 2008

Appellant had completed his parenting class and was enrolled in counseling. M. and R. were enrolled in counseling and participating in conjoint sessions with appellant; Joachim Hagopian, their therapist of a month, believed M. and R. had significant psychological problems which warranted mental health services. The therapist felt M. was traumatized by being separated from R. and appellant. M. was tearful when she had to be separated from appellant and R. after her visits, and she repeatedly asked to go home to appellant.

The CSW had monitored many visits between appellant, M. and R. and observed a strong affectionate bond between them; he concurred with the therapist that M. consistently wanted to reunify with her father and brother. Appellant was cooperating with the Department and appeared motivated to reunify with M. The family was receiving maintenance services and doing well. The CSW asked for discretion to start weekend visits for appellant to reintegrate M. back into the home and for walk-on, home-of-parent, father, when appropriate. The CSW also recommended alternate weekend visits with mother.

Mother was soon to complete her parenting class, and her boyfriend had taken a psychological test, and the assessment form showed he had no significant pathologies.

At the January 14 hearing, both parents asked for M.'s placement. The Department and appellant argued in favor of the court following the therapist's recommendation; M.'s counsel sided with mother. The court recessed the hearing so the minor could file a section 388 petition, which she did.

V. Section 388 Petition and Review Hearings

Minor's petition asked M. be placed home-of-parent, with mother. It alleged mother's psychological evaluation did not show any significant pathologies, M. had visited on weekends for three months without reported incident, and mother was one week away from completing her parenting class. The petition alleged M. could be safely placed with mother, and placement with a parent, when it could be safely done, was in the child's best interests. The court set the petition for contest on January 28 and ordered alternate weekend visitation for the parents.

A. January Hearing

The Department's January report indicated M.'s therapist continued to recommend it would be in her best interests to be returned to the home of her father. Appellant had just started with overnight visits, and according to all reports, the visits had gone extremely well. As to minor's section 388 petition, the CSW stated:

> [I]t would be precipitous to change [M.'s] placement at this time. She has just begun to have weekend visits with her father and brother. More time is needed to evaluate this major change from monitored to unmonitored weekend visits. Also, it is not clear at this time what impact full time residence with her mother will have on her half-sibling and how this will affect the family dynamics. Now that mother has started wraparound services, a future report from the new therapist would be helpful in determining the quality of interaction between [M.] and [B.]

The CSW reiterated M.'s expressed desire was to return to appellant's home and again asked for discretion to walk on a home-of-parent request.[2] Attached to the report was another letter from M.'s therapist urging her return to her father and brother. The therapist stated that in therapy sessions, M. had disclosed that in mother's home, her older sister still behaved aggressively toward her.

At the hearing, the Department indicated it favored placement with appellant due to concerns about B.'s actions toward M. The Department wanted mother and M. to participate in conjoint counseling. Mother's wraparound services had begun a week before. The court sua sponte addressed minor's counsel, "Mr. Roy, you're the moving party on this. Is there any objection to the court continuing the 388 petition to March 10th for a hearing that will be six weeks away and in the interim I'll release the child to mother." Roy did not object, but appellant's counsel strenuously objected stating that in essence the court had just granted the petition; counsel argued M.'s therapist had detailed several instances when M. felt unsafe and threatened by B., the placement was contrary to M.'s expressed desire, and the premature placement undermined appellant's efforts for placement towards which he was diligently working.

The court stated it could not hear the matter due to an ongoing adjudication, and advanced the contest to February 11. The court released M. to mother on the condition

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[2] As M. was only six years old, her desires were not determinative.

wraparound services were in place. Appellant's alternate weekend visits were to continue. The court denied the Department's request for a stay of the orders.

B. February Hearing

The Department reported mother's wraparound services had been instituted, but the CSW had been unable to speak with the person providing the services. According to mother, everything was going well in her home. The CSW stated that if M. was to remain with mother, the case should be transferred to San Bernardino to enable M. to receive full services.

Attorney Dylan Roy, who represented both M. and R., informed the court that R. had told him how much he (R.) wanted his sister returned to reside with him and appellant. Roy then argued M. should be placed with mother. At the afternoon session, Roy asked to be relieved because he had an actual conflict of interest with another case. The court appointed a new counsel for M. and continued the contest to February 17 so counsel could familiarize herself with the case.

The San Bernardino therapist for B. and the family reported things were going well in the home. Although M. and B. had sibling issues, they were normal as M. integrated into the home of mother and stepfather.[3] Mother displayed appropriate parenting skills. M. was being serviced through B.'s services and would not be eligible to receive her own services until the case was transferred to San Bernardino. M. had to repeat kindergarten because she could not do first grade work.

The Department now advocated that if M. was to remain with mother, the case be transferred to San Bernardino. Attached to the report, was a letter from therapist Hagopian stating M. should go back to live with appellant and R. and M. was being emotionally abused by B. The therapist opined that with the impending birth of yet

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[3] Although the therapist refers to the stepfather, the interim reports for 2008 continue to refer to him as mother's live-in companion.

another child to a mother who had her own mental health challenges, the care of two special needs children would be too stressful for mother to ensure M.'s safety. Based on his observations of appellant, R. and M. and their close relationship, Hagopian opined the best placement for M. was with appellant.

The court continued the section 388 contest to April 7.

C. April 7, 2008, Section 388 Hearing

1. CSW's Testimony

The Department now recommended M. stay with mother and the case be transferred to San Bernardino, which would serve M.'s best interests because she would be eligible to obtain services in her own right. The CSW knew M. was not on target academically, but he did not know why. According to M.'s new therapist, M. was experiencing normal sibling issues with B., but no violence was reported. It was better for M. to remain with mother than return to foster care. M. denied B. hit her or was mean to her. Both parents had been diligent in acquiring services for M.

2. R.'s Testimony

R. believed his sister should come home. In the past, R. had been in mother's home, and he believed appellant was the better parent, teacher and disciplinarian. Appellant kept a clean house and expected his children to be well behaved in public. R. had seen changes in his sister since she began living with mother; M. used bad words and would tantrum when she could not get her own way, which was very uncharacteristic of M. M. complained B. called her stupid and ugly. R. wanted M. to come home both for her sake and for his own sake.

3. Appellant's Testimony

Appellant continued to object to M. living in the same home as B. due to B.'s violent tendencies. M. had changed behaviorally since being placed with mother. On two recent occasions, M. threw tantrum fits when she did not get her way. M. now hit herself in the face. Hagopian helped M. with behavior modification when she hit herself.

M.'s behavior had started to improve, but she would not be able to see her current therapist if her case was moved to San Bernardino because the Department would not pay for duplicative services.

During a recent incident when appellant was talking on the phone to M., he heard B. try to take the phone away and hit M.; that incident was just two weeks ago. Mother was not cooperating in arranging visits between appellant, M. and R. R. wanted to move to San Bernardino because he missed his sister. Due to his previous experience of mother's illness during and after her pregnancy with M., appellant had additional concerns about mother's ability to care for M. now that she was pregnant again and B. was quite a handful.

4. Court Ruling

After argument, the court stated that although it initially had concerns for M.'s safety, M. had now been in an extended visit of four months in mother's home without reported incident. The court granted the section 388 petition and changed the placement order to home-of-parent, mother. Appellant's visits remained on alternate weekends, and the matter remained calendared for the preexisting six month review on April 21, which the court now redesignated as a section 364 review hearing.

Appellant filed a timely notice of appeal from the April 7 order.

D. April 21 Review Hearing

The Department reported M. was attending kindergarten and being evaluated for special education services. M. was performing at or near grade level. The family continued to receive services through San Bernardino County. M. would be referred to her own services once the case was transferred. In the past three months, mother had provided appropriate care for M. Appellant's alternate weekend visits with M. had gone well. The Department recommended the case be transferred to San Bernardino and M. continue living with mother.

At the hearing, appellant requested a contest asking for M.'s return. The court stated the issue of return to appellant was not properly before the court. Over appellant's objection, the court continued services and jurisdiction and left M. with mother. The court announced it planned to terminate jurisdiction on October 2 and set another section 364 review hearing for that date.

Appellant filed a timely notice of appeal from the April 21 order.

Subsequently, this court took judicial notice of a January 21, 2009, order transferring the case to San Bernardino.

DISCUSSION

I. Section 388 Petition

A. Release to Mother

Appellant contends that the court's placement with mother prior to an evidentiary hearing on the merits of the section 388 petition under the guise of an extended visit was an act outside the court's jurisdiction. Appellant asserts no case allows a court to grant the requested relief three months prior to the hearing. Citing several cases (see e.g., *Savanna B. v. Superior Court* (2000) 81 Cal.App.4th 158 and *In re Andres G.* (1998) 64 Cal.App.4th 476), appellant argues those cases hold that fictional visitation orders which are a subterfuge for placement are unauthorized and not supported by statutory law or the rules of court. In those cases, the juvenile court found that there was no reasonable means to protect the child without removal from the parent's custody and then granted the child a 60-day visit or detained the child with the parent. (*Savanna B. v. Superior Court*, *supra*, 81 Cal.App.4th at pp. 160-161; *In re Andres G.*, *supra*, 64 Cal.App.4th at p. 483.) The courts concluded the orders were a legal fiction and unauthorized because they were inconsistent. (See *Savannah B. v. Superior Court*, *supra*, 81 Cal.App.4th at pp. 161-162 [discussing the cases].)

In the case at bar, the juvenile court removed M. from appellant's custody in May 2007 finding removal was necessary to protect M. In October 2007, the court declined to release M. to mother because the Department had failed to provided sufficient information about the risks imposed by unrelated males in mother's home and by B., who had impulse control problems and had injured M. when M. was an infant. By the time the court released M. to mother in January 2008, its concerns had been addressed as there had been a psychological evaluation of mother's fiancé and services were in place to help with B.'s behaviors.

Thus, this case was not similar to the cases cited by appellant because the release to mother was not inconsistent with the detention from appellant and therefore the order was not outside the court's jurisdiction.

B. Due Process

Appellant argues the release was equivalent to prejudging the petition before the hearing on the merits which violated his due process right to a fair and impartial hearing. The section 388 petition requested a home-of-parent order for mother; the court released M. to mother in January, but did not grant a home-of-parent order until after the April 7 contested hearing on the section 388 petition. Appellant also complains that the issue at the section 388 hearing became whether placement with mother was better than placement in the foster home and there was no consideration of return to him and that the inordinate amount of time it took to litigate the petition altered the equities. We agree the issue at the section 388 hearing was whether to issue a home-of-parent, mother order, not whether M. should be released to mother or appellant.

"Due process requirements in the context of child dependency litigation have similarly focused principally on the right to a hearing and the right to notice. A meaningful hearing requires an opportunity to examine evidence and cross-examine witnesses." (Citation omitted.) (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412-413.)

However, we disagree the time it took to litigate the petition altered the equities. Had the court not had concerns about the risks in mother's home, it could have released M. immediately to mother as a nonoffending parent under section 361.2. Thus, any prejudging or alteration of the equities is built into the system. Appellant had notice from the section 388 petition that the court was considering a change in placement. In addition, appellant presented evidence at the contested section 388 hearing about why he thought M. should not be released to mother. Thus, having had notice and an opportunity to be heard, there was no violation of appellant's due process rights and any error in releasing M. prior to the hearing was harmless beyond a reasonable doubt. (See *In re Angela C.* (2002) 99 Cal.App.4th 389, 394-395.)

C. Substantial Evidence

Appellant posits the court abused its discretion when it granted the section 388 petition because the petition did not show changed circumstances or that the modification was in M.'s best interests. (See *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) By granting the requested relief, the court impliedly found to the contrary. Evidence adduced for the section 388 hearing showed changed circumstances in that the court's concerns about the risks posed by unrelated males in mother's home and by B. had been satisfactorily addressed. In addition, as noted in the petition, in this case, it was in M.'s best interests to be placed in the home of a parent rather than in foster care. No evidence was presented showing foster care was a better a placement. Accordingly, the court did not abuse its discretion in granting the section 388 petition.

II. Six-month Review

Appellant contends the court misapplied the law when it denied his request for a contest on placement at the first six-month review hearing. Although the April 21 hearing was originally designated as a section 366.21 review hearing, the court improperly redesignated the hearing as a section 364 hearing when it granted minor's section 388 petition.

In *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1448-1449, the children, who had been detained from mother, were released to father at the first six-month review hearing and the matter was continued for a section 364 hearing as to father and a section 366.21, hearing as to mother. The court discussed the applicability of section 364. "Section 364 applies when a dependency court determines that jurisdiction under section 300 is appropriate, but 'the child is not removed from the physical custody of his or her parent or guardian . . . .' (§ 364, subd. (a).) . . . Because the minors did not live with father when first detained, but were instead taken from mother's home and eventually placed with father, the dependency court erred by proceeding under section 364. [*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 263-264] [section 364 applies when a child is not removed from the physical custody of the parent or guardian, and has no application where a child is placed in the home of a parent with whom the child did not previously reside after being removed from the home of the other parent.]".) (*In re Janee W., supra,* 140 Cal.App.4th at pp. 1450-1451.)

The *Janee* court went on to discuss the applicability of section 361.2 "Instead, we believe this matter should have been determined under section 361.2, which provides that when a court assumes jurisdiction of a minor, it must determine 'whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child.' If so, the court must place the child with that parent unless it finds that doing so poses a risk of harm to the child. (§ 361.2, subd. (a).) Under that section, when the court orders removal of a child from a parent's home and determines that another parent, with whom the child did not previously reside, is available, it may choose two options. First, it may simply terminate jurisdiction and give the other parent legal and physical custody of the child. (§ 361.2, subd. (b)(1).) Second, it may have the other parent assume custody of the child, and 'may order that reunification services be provided to the parent or guardian from whom the child is being

removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.' (§ 361.2, subd. (b)(3).) . . . Even though section 361.2, by its terms, applies when the court first takes jurisdiction of a child, its procedures can be invoked at the six-month and 12-month review hearings, as occurred here." (Citations omitted; emphasis added.) (*In re Janee W., supra,* 140 Cal.App.4th at p. 1451.)

The Department asserts the court did not err in designating the six-month review hearing as a section 364 hearing pursuant to *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 315, in which this court concluded *Janee* did not hold a court cannot set a section 364 hearing after entering a home-of-parent order at a review hearing. However, in *Bridget A.*, the children who had been removed from their mother's custody were returned to the mother's custody. This court reasoned section 364 applied because "a hearing at which an out-of-home placement is terminated and a home-of-parent order entered is the equivalent of a hearing 'in which the child is not removed from the physical custody of his or her parent or guardian' within the meaning of section 364, subdivision (a)." (*Id*., at p. 314.) The court concluded there was "no distinction between a child who was never removed from the custody of his or her parent and one who 'remains' in his or her parent's custody at the time of the review hearing following an initial removal and subsequent return home." (*Id*., at p. 315.)

In the instant case, M. was taken from appellant's home and eventually placed with mother subject to the jurisdiction of the court. Accordingly, section 364 did not apply to appellant. (See *In re N. S.* (2002) 97 Cal.App.4th 167, 171 ["If a minor has been removed from parental custody and remains out of custody, the court holds a six month review hearing under section 366.21, subdivision (e)."].) The court initially choose not to release M. to mother because of certain concerns it had. The court was performing its

function of determining whether placement with mother would be detrimental to M. (See § 361.2, subd. (a); *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1132, 1135.) At the April 21 hearing, the court continued services for both parents. Thus, appellant should have been able to contest placement at the six-month review hearing pursuant to section 366.21, subdivision (e).[4]

In relevant parts, section 366.21, subdivision (e) provides: "Whether or not the child is returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that the return would be detrimental or not detrimental. The court shall make appropriate findings pursuant to subdivision (a) of Section 366." Although the court continued jurisdiction on the basis conditions existed which justified jurisdiction under section 300, the court did not identify the factual basis for that statement (i.e., what conditions justified continuing jurisdiction) or whether conditions continued to exist as to both parents.

Even though by its terms, section 366 refers to status review of a child in foster care, it appears the Legislature intended the required findings under subdivision (a) to apply to a child who was placed with previously noncustodial parent. (See *In re Nicholas H., supra*, 112 Cal.App.4th at p. 264 ["[W]hen a dependent child is placed with a previously noncustodial parent and both parents are afforded services, review hearings are to be held pursuant to section 366."].) Although we conclude the review hearing should have been held pursuant to section 366.21, subdivision (e), the Legislature intended section 366 to provide guidance as to what the court should consider at that hearing.

In *Nicholas H.*, the court discussed why the factors listed in section 366 are applied differently in a case of parent placement as opposed to a case of foster care

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[4] At the April 7 hearing, the court acknowledged that placement was always an issue.

placement. (*In re Nicholas H., supra*, 112 Cal.App.4th at pp. 265-268.) The court observed: "When making a custody determination in any dependency case, the court's focus and primary consideration must always be the best interests of the child. Furthermore, the court is not restrained by 'any preferences or presumptions.'" (Citations omitted.) (*Id*., at p. 268.) The court concluded, "the risk of detriment assessment and the need for continuing supervision inquiry are valid and relevant considerations when the juvenile court makes a custody decision in a section 361.2(b)[3] case. However, the court must still decide which parent should receive custody of the child by considering the best interests of the child." (*Ibid*.)

In the case at bar, the court did not make any best interests determination. The Department contends any failure to allow a contested hearing was harmless because appellant could not establish prejudice in that he had a contested hearing three weeks before the April 21 hearing and presented all the evidence as why M. should not be placed with mother. That contention is without merit as the court only considered whether M. should be released to mother or returned to foster care at the April 7 hearing, not whether placement with appellant or mother was in M.'s best interests.

Appellant contends by denying him a contested hearing on placement the court deprived him the ability to introduce evidence of detriment to the sibling relationship between M. and R. and the impact on M.'s emotional and mental health of placing her with mother. "[S]ection 361.2 simply instructs the court to consider whether placement with the noncustodial parent would be 'detrimental to the safety, protection, or physical or emotional well-being of the child.' A detriment evaluation requires that the court weigh all relevant factors to determine if the child will suffer net harm. Sibling relationships are clearly a relevant consideration in evaluating a child's emotional well-being." (Citation omitted.) (*In re Luke M*. (2003) 107 Cal.App.4th 1412, 1425.) One of the section 366 factors is the "nature of the relationship between the child and his or her siblings." (§ 366, subd. (a)(1)(D)(i)(I).)

Here, the reports show that not only was appellant complying with court orders, but also, although the Department initially wanted M. released to mother, by January 2008, M.'s therapist and the CSW recommended M. be returned to appellant's home. It was only after M. was released to mother that the Department recommended M. be placed with mother so M. could receive her own services from San Bernardino County. At no time did the court evaluate the benefit or detriment of the homes of appellant and mother to determine which was a better placement for M. The record shows there were problems with both homes.

Accordingly, we will reverse the order of April 21 and remand the matter for a contested hearing on the issue of placement. Because the case has been transferred to San Bernardino, we asked the parties to address what relief this court should grant if we determined appellant's appeal was well-taken. Appellant suggested this court has no authority to order relief be provided by a trial court outside of its jurisdiction. The Department argues this court has jurisdiction to decide the appeal and remand the matter to the San Bernardino court pursuant to *In re Lisa E.* (1986) 188 Cal.App.3d 399. In *Lisa E.*, the Court of Appeal held that it retained jurisdiction over an appeal even though the case had been transferred to another county and that its decision would be binding on the superior court in the other county. (*Id.*, at pp. 403-405.)

We also asked the parties to address the issue of whether this court could temporarily vacate the transfer order and remand the matter directly to the Superior Court of Los Angeles County rather than the Superior Court of San Bernardino County. We are faced with a situation in which the Los Angeles court improperly denied appellant a contested hearing on placement, but vacating the transfer order, even temporarily, might lead to the termination of the services M. is receiving in San Bernardino where she resides with her mother. The San Bernardino court is not familiar with the family situation as it existed at the time of appellant's request for a hearing on placement. Accordingly, the most practical solution is to remand the matter to the Superior Court

of Los Angeles County and not vacate the transfer order. (See *In re A.R.* (2009) 170 Cal.App.4th 733; *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1088, fn. 15.) The Los Angeles court is to address the issue of whether it was in M.'s best interests to be placed with appellant at the time of his request, including considering the effect on the sibling relationship. If the Los Angeles court decides M. should have been placed with appellant, then it can vacate the transfer order.

DISPOSITION

The April 7 order is affirmed. The April 21 order is reversed and remanded to the Los Angeles juvenile court to hold a contested section 366.21 review hearing and address the issue of which parent should have custody of M.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.